National Retail Federation®
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January 3, 2011

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Docket No. R-1393 / RIN No. 7100-AD55
Section 226.51 Ability to Pay

These comments are submitted on behalf of the National Retail Federation (NRF) regarding the Board's proposals with respect to a credit applicant's "Ability to Pay" under the Credit CARD Act. As the world's largest retail trade association and the voice of retail worldwide, the National Retail Federation's global membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners from the U.S. and more than 45 countries abroad. In the U.S., NRF represents the breadth and diversity of an industry with more than 1.6 million American companies that employ nearly 25 million workers and generated 2009 sales of $2.3 trillion. Many NRF members have card programs that provide traditional retail credit, private label credit or co-branded credit cards to their customers.

At the outset, we must again express retailers' serious concern at the apparent decision not to reflect in the proposal the distinction that exists in the statute between those individuals under 21 years of age, who must demonstrate an "independent" ability to pay, and adults above 21 years who must simply demonstrate an ability to pay. Congress made that distinction for a reason. The fact that the statute says that a younger credit applicant *must* have an adult co-signer or guarantor if he or she cannot fulfill an individualized assessment of his or her independent ability to manage a line of credit, while the statute places no such explicit requirement on individuals above the age of majority, indicates that for multiple reasons Congress intended that these two

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groups of credit applicants be treated differently. The proposal effectively obliterates that distinction.

Of equal concern, the proposal inadvertently undermines more than a generation of progress initiated with the passage of the Equal Credit Opportunity Act. Prior to the passage of ECOA, non-working spouses found it exceedingly difficult to develop credit in their own names. This was true even though they had access to all or a portion of the household funds. “Homemakers,” as they were then called, ran the household. This involved household shopping and may have consisted of opening retail credit accounts to provide for necessities associated with household management, and paying those and other family bills as they came due. Even though the homemaker was responsible for these tasks she (typically) could not obtain credit or develop a credit history in her own name. She was deemed not to have an ability to pay in deference to the spouse who worked outside the home. Credit grantors reinforced those social strictures. As a result, divorced or widowed homemakers discovered that they had no independent credit history and were often unable to obtain even the most basic loans for necessities once the working spouse departed.[1]

These and other social consequences of this arrangement were sufficiently severe that Congress was compelled to act, resulting in the passage of the Equal Credit Opportunity Act. What has flowed from that time is recognition that even though homemakers may not in fact directly earn income (few W-2s are issued to stay at home spouses) that does not mean that they do not have access to the household’s income

[1] Reg. B was designed to help create a credit history for stay at home spouses. It could not easily do that by excluding consideration of the family’s household income. Without consideration of family income, these spouses were economically stranded. Thus, to say, as does the proposal, that “Regulation B does not compel a card issuer to consider spousal or other household income when considering an applicant’s ability to pay…” while possibly accurate, is only half of the equation. It is just as true that ECOA does not prevent a card issuer from considering spousal or other household income when seeking to accomplish the same. Indeed, the policy considerations underlying ECOA encourage it.

This “issue” results not from the law but rather as a consequence of the proposal’s imposition of a new income requirement for adults. If positioned to require an individualized income stream, it would undermine ECOA, regardless of whether the implementing Reg. (Reg. B) dealt with the issue in the past. This is not a necessary result under the CARD Act: the two laws (CARD Act and ECOA) can and should be read to give full weight to each law.

and/or assets. This common division of labor and wealth is as much a part of our social fabric as it ever was. The difference is that over the past thirty-five years credit grantors have modified their models to more accurately reflect reality.

Few homemakers control *all* of a household's income, but their obvious access to at least *some* portion of the household's weal means that they can reasonably assume responsibility for fulfilling household obligations. Thus, a furniture retailer may reasonably accept the names of both couples on an installment loan, in part from recognition that the joint and several liability of both spouses is supported by the likelihood that either could fulfill the repayment obligation even if one of them should die or default. Similarly, a clothing retailer may grant a credit limit to a non-working spouse, premised on household income. The modeled credit limit need not assume that the applicant has access to *all* of the household's disposable income for repayment of the obligation; but, based on predictive models tracking the repayment abilities of other similarly situated households, one can reasonably assume that the spouse has access to *some* of the disposable income and set the credit limit accordingly. Indeed, most retail credit grantors set the initial limits quite low. Typically, a new account for an adult (i.e. over 21 years of age) in a department store is unlikely to exceed hundreds of dollars.

Bearing this in mind, we strongly urge the Board to at least adopt a compromise proposal, as it relates to those over 21 years of age, to better reflect social and commercial reality and the statutory distinction. As opposed to younger applicants, where the statute explicitly requires an individualized determination of their independent ability to pay, a more flexible approach for older adults would better match history, practice, and the goals of the ECOA.[2]

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[2] As was discussed, one of the factors driving adoption of the ECOA was the disparaging treatment of non-working spouses who, after many years of marriage, suddenly found themselves widowed or divorced. The harsh consequences of the former regime were most severe for former spouses whose entry into the labor market might further be delayed as a consequence of prolonged absence. They often had an even more compelling need to establish credit while waiting for alimony to be established or an estate to be settled. While older individuals are more likely ultimately to have access to such assets or income substitutes, be it promised alimony or the eventual settlement of an estate, thus guaranteeing repayment, the need for some credit to bridge the transition to that

For example, there exist valid income estimators. Some of these are derived from individuals' credit histories. While NRF members disagree in practice, they understand in concept the Board's reluctance to explicitly endorse the use of all of a household's income as a predicate for every applicant's ability to pay. Therefore, we also understand in concept the Board's disinclination to allow the use of income estimators that are themselves premised on the household's total income.

However, there also exist estimators that are based on a portion of the household income that has been legally attributed to each of its members. The credit report of a non-working spouse might consist of a single credit card, obtained before marriage, and joint obligations for the repayment on an installment loan of bedroom furniture purchased after marriage. As discussed above, if payments are not in default, to the extent that the non-working spouse is jointly and severably liable for the second item, and is directly liable and has paid as agreed for years on the first, the report for that individual reflects not so much household income as it reflects the non-working spouse's *access* to funds necessary to meet contracted obligations. In practice, it doesn't matter whether the repayments are being made from unreported income, assets or an allowance, the fact is that the estimated income is derived from the individual's demonstrated access to funds.

We do not disagree with the Board's proposal that adults be allowed to provide their "income" on applications, without elaboration. Individuals can reasonably estimate the income which they are able to tap. However, as discussed below, this option alone will be impractical, intrusive or insufficient in many instances. Therefore we urge the Board to allow validated estimators of access to income to be used by retail credit grantors in meeting the ability to pay test for relatively modest retail credit lines. Such a compromise would greatly simplify the credit granting process and support the goals underlying ECOA, while still ensuring that the total extensions (when considered in

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status may be acute. Those under 21 are less likely to have had either comparable periods of unemployment or access to such significant assets. For them, Congress might reasonably demand a more intensive ability to pay examination in the first instance.

conjunction with other credit granting criteria) were reasonably related to the applicant's ability to repay.

Most certainly, such estimators should be available to accomplish increases in existing lines of credit. The amount of credit involved is typically much less than an initial line and the alternatives are impractical.

By way of example, an individual might state her income for purposes of opening a retail credit account which ultimately grants a credit limit of $500 based on her calculated ability to pay and the credit grantor's standard new account opening parameters. She might use the account for a year or more to purchase children's clothing without ever exceeding the original limit. However, the following Christmas she might seek to purchase, in addition to her usual items, a winter coat for a child that pushes her total purchase to $575.

At least two possibilities exist. She might well have qualified for a higher limit than $500 based on her stated income from a year earlier, but the retailer, because it exercises extra prudence in opening new accounts, chose to limit the account on opening to no more than $500. The second is that $500 is the most she qualified for at the time of account opening but her other obligations have since declined or her access to funds has increased in the intervening year. In such cases, it would be just as safe, and far less intrusive, to rely on a bureau derived estimate of her access to funds than to stop the transaction midstream for a reapplication.

For obvious reasons, retailers wish to minimize the number of negative encounters with their customers. One can imagine the reaction of a qualified customer if at the point of sale, with a dress, a pair of slacks and a winter coat in hand her transaction is stopped while the sales clerk says: "I am sorry Mrs. Jones, but I can't let you purchase these items unless you tell us your income."

A quick, nearly instantaneous and seamless review of the existing customer's account, including an electronic check of an income access estimator and credit score would have told the store that the customer easily had the ability to pay for the purchases; and the credit line could have been increased by $75 accordingly. The customer is pleased, credit has been properly allocated, and a potentially embarrassing conversation has been avoided. This is a win for all concerned. Under such an approach, the number of negative conversations is limited only to those where the customer does not have access to funds sufficient to support a heightened ability to pay. In those cases, the transaction would be declined.

Similarly, retailers may increase a customer's limit, during the course of the year, based on payment history and other creditworthiness criteria. Allowing use of a bureau developed income access estimator would mean that a store would not have to affirmatively solicit an income statement from a customer before a credit line could be prudently extended.

In closing, we strongly urge the Board to reconsider the distinction in the statute between extensions of credit for those under 21 years of age and for those above the age of majority. In doing so, it is not necessary that the Board amend its rule so far as to allow explicit consideration of household income when making credit determinations of adults (although we believe it warranted), but we strongly believe that the positive goals of the ECOA and the language of the CARD Act can better be fulfilled were the Board to at least adopt our proposed compromise which would better facilitate the extension of credit in real world situations.

Respectfully submitted,

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